BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: FORTUNA IRON WORKS 115 N. Main St. Fortuna, CA 95440 Employer	Docket 06-R2D3-4222 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on August 30, 2006, the Division of Occupational Safety and Health (Division) conducted a planned permit inspection of a place of employment in California maintained by Fortuna Iron Works (Employer). On September 28, 2006, the Division issued a citation to Employer alleging a violation of workplace safety and health standard codified in California Code of Regulations, Title 8, and proposing civil penalties.[1]

The citation, designated Citation 1, alleged a "general" violation of section 1541.1(a)(1) [failure to provide protective system in trench 5 or more feet deep].

Employer filed a timely appeal.

Administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of the parties, the ALJ issued a Decision on August 21, 2008, sustaining the citation and amending the proposed penalty from $675 to $450.

[1] Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Employer timely filed a petition for reconsideration. The Division filed an answer to the petition.

The Board took Employer's petition under submission by order of November 10, 2008.

ISSUE(S)

Whether the Decision correctly found Employer had committed the alleged violation.

EVIDENCE

The summary and discussion of the evidence in the Decision are incorporated here by reference. For clarity, we briefly restate the evidence here.

On August 30, 2006, a Division inspector arrived at the worksite in Arcata, California to conduct an inspection of the trench or excavation which had been made to expose a previously installed underground pipeline and enable a new branch pipeline to be connected to it. The main contractor, a firm identified as Mercer Fraser, had dug the trench, which the Division's Inspector measured to be 8 feet deep, 8 feet wide at the north end and 14 feet at the south end.[2]

Employer was a subcontractor on the project. Its task on August 30 was to connect the new pipeline to the older one by welding the two pipes together. To accomplish this, Employer sent one of its employees, Jerry Stewart, to the site. When the Division inspector arrived, Stewart was in the trench welding the pipes together. The inspector spoke to the Mercer Fraser foreman on site, examined the trench, the shoring Mercer Fraser had installed, the soil and site conditions, and instructed Mercer Fraser to halt work until additional shoring had been installed in the trench. When the additional shoring had been installed, Stewart completed the welding and left the worksite.

The inspector also interviewed Stewart while at the site.

As a result of the inspection, the Division cited Employer for failing to provide cave-in protection in the trench.[3]

---

[2] The record does not reveal the length of the trench with precision but it was estimated to be about 12 to 15 feet long.

[3] There was testimony that Mercer Fraser was also cited for an alleged trenching violation as a result of the Division's inspection. That citation is not the subject of this proceeding.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the briefs and arguments of the parties.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

Employer's petition for reconsideration contends the evidence does not justify the findings of fact and the findings of fact do not support the Decision.

Section 1541.1(a)(1) provides:

> (a) Protection of employees in excavations.
> (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c) except when:
> (A) Excavations are made entirely in stable rock; or
> (B) Excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The undisputed evidence established the trench was not "entirely in stable rock," was in excess of 5 feet deep, and that Employer's employee, Stewart, was working in the trench before its shoring was corrected. Unless Stewart was "protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c)[,]" the violation was established. (§ 1541.1(a)(1).)

To determine whether the protective system was adequate we must analyze the evidence in the record concerning the details of the trench conditions and compare those data to the requirements of the safety order.

One factor in that analysis is the soil type involved because the shoring required for adequate protection is different for different soils. Employer and the Division disagreed about the type of soil into which the excavation was dug. Employer contended it was "Type A" soil as defined in Appendix A to section 1541.1. The Division maintained the soil was "Type B," also as defined in Appendix A. The preponderance of the evidence established that the excavation was not made in Type A soil. First, Employer offered no direct evidence that the soil was Type A. Second, the definition of Type A soil in Appendix A to section 1541.1, in pertinent part, excludes the soil in question from being Type A soil: "However, no soil is Type A if: (2) The soil is subject to vibration from heavy traffic, pile driving or similar effects; or (3) The soil has been previously disturbed[.]"

The evidence showed that the trench was near a road on which traffic was passing. In addition, the evidence showed that a backhoe was operating near the trench and approached to within two or three feet of the trench's edge while Stewart was in it.[4] The excavation therefore was subject to vibrational disturbance which would have caused it to lose a Type A classification even if the soils themselves were of Type A material. Moreover, it was shown that the soil into which the excavation was made had been previously disturbed because the old pipeline had been installed and because the trench in question was dug at a point where the old and new pipelines came together. We conclude, based on the foregoing, that the soil involved was not Type A soil.

Next we consider whether the shoring initially installed in the trench was adequate to protect Stewart, or other employees, when he was in the trench. Section 1541.1(a)(1) requires that protective systems meet the requirements found in sections 1541.1(b) or 1541.1(c), as applicable. The least stringent of those requirements apply to excavations in Type A soils. If the shoring did not satisfy those standards, it would not meet the requirements for Type B or Type C soils. As we will show next, the shoring was not adequate for Type A soils.

Even if the soil involved were of Type A, the shoring system initially installed by Mercer Fraser and observed by the inspector did not meet the requirements of section 1541.1(c).[5] Employer maintained that the trench shoring complied with the "timber shoring" requirements of Appendix C, as called for in section 1541.1(c)(1). Appendix C, in pertinent part, sets forth tables showing the required size and spacing of the various components of timber shoring systems for different soil types. Table C-1.1 applies to

[4] In addition to the risk of soil disturbance as a result of vibration caused by the motion of the backhoe, section 1541.1, Appendix C, subpart (d)(2)(B) shows that standard shoring requirements are not adequate if there is addition weight near the edge of a trench. See, for example, subpart (d)(2)(B) paragraphs 1 and 3. The backhoe's approach near the edge of the trench would add additional weight to the soil there.

[5] Section 1541.1(b) applies to protective systems using benching and or sloping (i.e. the cross-section shape) of the excavation. Although Mercer Fraser did make a small bench, a steplike form or shape in one wall of the trench, it did not meet the requirements of 1541.1(b) and the walls were effectively vertical, not sloped or benched. The protection method used was shoring with timber and plywood panels.

excavations in Type A soils. As specified in that Table, a trench 5 to 10 feet deep and up to 9 feet wide (the dimensions of the trench at the location where Stewart was working) requires 4-inch x 6-inch (width and thickness) crossbraces. The evidence was not disputed that only one crossbrace was used initially. Employer argued that only one was required, because Table C-1.1 calls for 4-foot vertical spacing of crossbraces. Employer's argument, however, fails to take into consideration the requirement of Appendix C, subdivision (g) 7, which states (in pertinent part): "Placement of crossbraces. When the vertical spacing of crossbraces is four feet, place the top crossbrace no more than two feet below the top of the trench." The single crossbrace in the trench when initially inspected was four feet from the top. Moreover, if the top crossbrace must be no more than two feet from the trench's top and the required vertical spacing between crossbraces is no more than 4 feet, then a second crossbrace was required 4 feet below the one at the two-foot level, and the trench in question was accordingly required to have two crossbraces. It had only one crossbrace, and thus even if the soil were Type A, the shoring system was not in compliance with the requirements of section 1541.1(a)(1). We affirm the Decision's holding that Employer was in violation of section 1541.1(a)(1).

A copy of Table C-1.1 is attached for reference.

In its appeal Employer also raised the "independent employee action defense" (IEAD). The IEAD is an affirmative defense consisting of five elements, each of which must be shown to exist by a preponderance of the evidence. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) If the employer asserting the IEAD fails to establish any one or more of the elements, the defense does not apply. (*Id.*) The five elements are: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions against employees who violate the safety program; and (5) the employee caused a safety infraction which he or she knew was contrary to the employer's safety requirements.

The ALJ found that Stewart was not experienced in the job being performed, among other failings. Although Stewart was performing a welding job, and had been a welder for many years, the hazard to which he was exposed was the inadequately shored trench. In this respect Stewart was not properly experienced; in fact, he testified that he relied on Mercer Fraser's foreman to have made a correct evaluation and taken appropriate protective action. As shown above, Mercer Fraser had not adequately shored the trench to protect against cave-ins. Thus, Employer did not satisfy the first element of the IEAD.

Employer offered testimony that it enforced its safety program and sanctions employees who violate it (elements 3 and 4). Even giving Employer benefit of the doubt on those considerations, Stewart's reliance solely on Mercer Fraser's view of what was required for adequate trench protection shows he was not properly trained to recognize safety hazards inherent to his work in trenches, and further that Employer took no steps to have someone with necessary knowledge inspect the conditions Stewart was assigned to work in as a means of checking that he was not exposed to another employer's error. Thus, Employer failed to establish element 2. And, Stewart thought he was acting safely and in compliance with Employer's safety program, element 5, and so it too was not satisfied.

There is an additional reason Employer cannot prevail even if all elements of the IEAD were met. We have held that the defense does not apply where the safety order at issue imposes an affirmative guarding requirement, as is the case here. (*Pacific Westline, Inc.*, Cal/OSHA App. 10-0278, Denial of Petition for Reconsideration (Dec. 20, 2010).) The purpose of a guard is to prevent accidental contact with the hazard involved. Here the hazard to be protected against was cave-in of the trench, and Stewart was assigned to and did work in an inadequately protected trench. Thus, the positive guarding requirement was not met, and the defense, even if it had been proven, would not apply.

For the reasons stated above, we affirm the Decision of the ALJ and the civil penalty of $450 imposed thereby.

ART R. CARTER, Chairman
ED LOWRY, Board Member
JUDITH FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: AUGUST 30, 2012